

**MINUTES**  
**INSOLVENCY LAW COMMITTEE**  
**OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA**

**November 12, 2004**

The regularly scheduled meeting of the Insolvency Law Committee of the Business Law Section of the State Bar of California was held on November 12, 2004, at the offices of Wendel, Rosen, Black and Dean in Oakland, California. The following members attended the meeting in person or by telephone:

Peter Bronson  
Molly Baier  
Michael Buckley  
Elizabeth Berke-Dreyfuss  
Sharon Dutton  
Lisa Fenning  
Barry Glaser  
Eve Karasik  
Michael Koch  
Howard Kollitz  
Donna Parkinson

Mark Porter  
Maria Pum  
Dan Schechter  
David Shemano  
Ed Tredinnick  
Colin Wied  
Mary Jo Wiggins  
Craig Wolfe

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Russell Clementson (Ex Officio)  
Rob Harris (ExComm Liaison)  
Sandy Lavigna (Ex-Officio)

The following members did not attend the meeting with advance notice: Bob Franklin, Clifford Stevens, Paul Pascuzzi and Malhar Pagay.

Peter Bronson called the meeting to order at approximately 10:15 a.m. All members attending the meeting were able to download materials circulated by the Chair in advance.

**1. Approval of Minutes: September 17, 2004.**

The minutes of the October 8, 2004 meeting were approved as submitted.

**2. Membership.**

At its October 8<sup>th</sup> meeting, the Committee adopted an attendance policy to encourage participation (the “**Attendance Policy**”) that includes an RSVP procedure in advance of meetings and under which the Chair will write a letter to any member after three unexcused absences requesting diligent attendance. Rob Harris noted that this policy is consistent with the Business Section’s: after three unexcused absences, the Chair should send a letter requesting either attendance at all remaining meetings during the term or resignation.

The Chair noted an update on the membership roster for Dan Shemano’s information. He next discussed the Membership Matrix, which Rob Harris noted is a tracking device for the State Bar with regard to committee composition. Members will be asked to review their own information (or, in the case of new members, to supply information) and indicate to the Chair if any of it needs

to be changed on the Matrix. Some uncertainty exists about the Committee's present membership, and in particular, whether Eric Sagerman remains a member. The Chair and Rob Harris will research current membership by the next meeting .

### **3. Meeting Schedule.**

The Chair proposed to alter his circulated meeting schedule by switching the host site for the January meeting from San Diego to Oakland to permit in-person participation by members attending the Winter SEI and in parallel to designate San Diego (rather than Oakland) as the host for April. No member objected, and the Schedule will be amended accordingly. Rob Harris also noted that the Executive Committee Long Range Planning Retreat will be held at La Costa and not at L'Auberge, Del Mar as originally announced.

A further goal of the Attendance Policy was to encourage in-person attendance at meetings to increase face-to-face participation by (i) establishing four sites (one in each of the Bay Area, Sacramento, Los Angeles Area and San Diego), and designing one the "host site" and the others "satellite sites" to be linked by phone to the host site, (ii) requesting that members travel at least to the nearest site (and RSVP to alert site hosts about expected turnout) and (iii) permitting members who could not attend in person at one of the sites to participate by phone. The Chair noted that none of the three "non-host" satellite sites proved viable for this meeting. Lisa Fenning suggested that satellite sites may need to be closer to the members' offices in a particular area, *e.g.*, the Century City site may not be convenient for members whose offices are in downtown L.A. After discussion, the Committee concluded that the plan should be continued for a couple of additional meetings before evaluating its success.

### **4. Subcommittee – Assignments and Schedules.**

In response to the Chair's call for corrections to the circulated roster of subcommittee assignments for 2004-2005, none were voiced, and the Roster was deemed adopted in its current form. The chair of each subcommittee was encouraged to schedule meetings to ensure progress on the subcommittee projects. Rob Harris noted that 2004-2005 is a short year for the Committee (because terms run through the Annual Meeting of the State Bar, next scheduled in September 2005, 11 months after the 2004 Annual Meeting). He encouraged subcommittees to start work on projects before summer activities distract Committee members.

### **5. Budget.**

The Chair noted the Committee's budget for 2004-2005 is due November 30<sup>th</sup>, and he expects it to look very much like last year's budget, circulated with meeting materials. Rob Harris noted that budgeted expenses incurred by members – such as the cost of hosting at meeting sites – are reimbursable but requests must be submitted to Susan Orloff at the Bar within 30 days after the expenses are incurred, or reimbursement may be denied.

## **6. Education Subcommittee Report.**

### **A. October 2004 Annual Meeting.**

(i) Mark Porter reported on the results of the program entitled, "Practical Help for Business Lawyers: A Primer on Bankruptcy Asset Sales". Nels Nelsen of SVB Alliant Partners, Rob Shenfeld of Reed Smith LLP, and Mark were the panelists. The program was attended by approximately 30 people, most of them general business practitioners in small firms, though a few bankruptcy lawyers were present. The audience participated enthusiastically in the program which consumed the two-hour time with no problem. Mark indicated the program was a success.

(ii) As previously reported, the program entitled, "Bankruptcy Fraud after Enron: Filing Bankruptcy Without Going to Jail," was a great success and sold out. Lisa Fenning indicated that its panelists had lots of interaction with the audience, and the presence of an SEC panel member seemed to draw attendees. Lisa indicated that she had been told the program was videotaped and assumed this was so, but Elizabeth Berke-Dreyfuss reported that she has had no response from the Section to inquiries on this question. If the program had been videotaped, then it should be available for viewing and MCLE credits on the website, though some members believed there might be a delay in posting.

Rob Harris asked why the Bar had proposed to do tele-seminars, if tapes of prior programs were going to be available on the Bar's website. Elizabeth indicated that the Bar was never interested in live studio telecasts, because costs were prohibitive and attendees had to be available during the scheduled broadcast to view it. The Bar has focused instead on a video-on-demand approach through the website.

### **B. Winter SEI.**

Elizabeth Berke-Dreyfuss noted that "Bankruptcy 101" has been selected as the program for the Winter SEI. The program will be held on Friday January 28<sup>th</sup> at 3:00 at the Sheraton. The panelists are Judge Leslie Tchaikovsky, Howard Kollitz and Elizabeth. Materials are due on December 13<sup>th</sup>.

### **C. Other Program Options.**

With regard to opportunities for other Committee presentations, Rob Harris indicated that the Spring Meeting, held for several years, appears to have been permanently discontinued for lack of financial success. No planning is ongoing for a Spring Meeting in 2005 at the Section level, and none is expected. With regard to the Annual Meeting next September 2005, the deadline for topic submission is coming up in January.

The Committee discussed joint and co-sponsored programs outside of the State Bar Annual Meeting and Winter SEI. The suggestions for venues included the ABI conferences, and meetings or, or joint presentations with, the California Bankruptcy Forum, the ABA and the Bay Area Bankruptcy Forum. Rob Harris indicated that joint presentations require approval only of Peter Szurley, the Subcommittee Chair of ExComm's Member Services Committee on Programs. The Chair asked if participation and possible revenue enhancement from entities such as title companies,

banks or the credit managers association would be of interest to the Section. Rob will inquire further and determine if co-sponsorship will require full ExComm approval. Elizabeth Berke-Dreyfuss will check with the Bay Area Bankruptcy Forum and explore possible joint programs with the ABI.

The Committee then discussed potential programs that it could develop and present. The Winter SEI rejected a proposal on discharging taxes in bankruptcy, and Elizabeth noted that some group had recently done a larger seminar on negotiating and resolving tax matters with the IRS. Mark Porter suggested that a joint program involving resolution of tax disputes with a bankruptcy related component could work. Molly Baier proposed a possible program on fraudulent transfers, and members suggested corporate formation and inter vivos trust issues as they related to fraudulent transfer issues. Mark Porter noted the well-attended program the Trusts & Estates Section presented at the Annual Meeting, and suggested they might be interested in a joint program on fraudulent transfer issues and inter vivos trusts. The Chair encouraged members to consider additional program topics and circulate ideas by email in advance of the December meeting.

Finally, the Committee discussed doing video seminars, tele-seminars and audio programs. A member suggested that programs in which Bankruptcy Judges are participants are difficult to record because Judges will generally not consent. Mark Porter suggested that the Committee have a goal of producing one program in this format to make up for the loss program from the cancelled Spring Meeting. Elizabeth wondered if the present website functionality allows participants to purchase a program, watch part of it, come back to it later for a period of time and pick up watching the rest.

## **7. Website and Constituency Report.**

### **A. Web Update.**

Mike Buckley reported that Bob Franklin tells him they are taking in new materials for the Website, pages are being updated with bulletins and legislative initiatives. Information should be sent to Bob and to Mike, as back up. Mike was unaware of any present problem, now that the site has been migrated to the new format and the buttons have been checked within the last three months. The Committee discussed additional links that could be added, and Mike cautioned that the Bar has a policy against linking to commercial sites such as “FindLaw” which might otherwise appear topically appropriate. Rob Harris confirmed this. The Website already has a number of links to government sites, nonprofits and insolvency organizations.

### **B. Other ideas**

*Business Law eNews* is a publication of the Section sent to all members. It has five editors, two of whom are active including Rob Harris. The publication is looking for three topics a month on legal developments, projects of interest and matters in which a Committee might want to solicit the opinion of the Section in general as opposed to only that of its constituency list. Rob reports that the eNews gets about a 75% click through rate, very high for unsolicited email. Articles could include a watered-down version of a publication in the *Business Law News*, or a lead-in to a project posted on the Website. Submissions should be 30-35 words long and should be sent to Rob or Mike.

### **C. Eblasts**

The Committee is continuing to solicit email addresses for e-blast lists. The Chair noted that we did not have a monthly constituency topic to send around, as Cliff Stevens had suggested at the October 8th meeting. Rob Harris noted a difference between “true” eBlasts and constituency emails: true eBlasts go to the entire Business Section, should be rare and must truly be of interests to all members of the Section. They require advance ExComm approval. Blast update emails to the Committee’s constituency list do not require this level of approval. Rob also noted that everyone on the Committee has access to the Committee’s own list-serve but that members should bear in mind that the ExComm Chair and Susan Orloff receive a copy of each email sent to the list-serve.

### **D. Constituency Lists**

The Chair proposed to appoint responsible a member for each local bar to pursue further addresses for constituency lists. Mark Porter indicated he through the Committee had previously decided that all information likely to be obtained from the local bars had been obtained and that once Paul Pascuzzi completed his current project on the California Bankruptcy Forum list, this item was to drop from the agenda. Mike Buckley indicated that Alameda and Contra Costa Counties had been adamant in refusing to divulge lists.

The Committee then discussed the need to keep the existing lists updated. Rob Harris noted that Susan Orloff gets a bounce message on each dead email address when messages are sent to the constituency list. The Committee discussed reviewing these on a periodic basis to update the constituency list. The Chair noted “spam” filters may be blocking receipt. Judy Gibbs had proposed that the Committee look outside the State Bar for possible constituents, and Mark Porter suggested that perhaps a list could be compiled of law professors teaching bankruptcy in the United States and those people offered inclusion on the constituency list.

Rob also suggests that the constituency list needs to be used regularly, so that addressees get used to expecting emails and read them. Otherwise they forget about the Committee bulletins and delete updates as junk. The Chair suggested that it might be possible to send periodic updates from the constituency list by the electronic version of the LA Journal to get a jump on reporting significant case developments to the constituency list.

## **8. Legislation and Current Projects.**

### **A. BLS Standing Committee Guidelines**

The Chair noted that the Standing Committee guidelines require all ALP’s to be submitted for consideration to ExComm by June 1, 2005. This means proposals, at the latest, must be approved at this Committee’s May meeting. Rob Harris encourage members to remember that other committees of the Business Section may have views on an ALP’s subject matter, and the Committee should work cooperatively with them to avoid surprise opposition when ExComm comes to vote on an ALP.

## **B. Model Real Estate Order**

The Chair noted the Committee's ongoing work on a Model Real Estate Order and that we recently became aware the Judges in the Northern District of California were crafting their own general model asset sales order. Paul Pascuzzi had prepared a letter to Ben Young, in his capacity as Northern District Bench and Bar Liaison, expressing concerns about the form of the order. After ExComm approval, the Chair then sent the letter on behalf of the Committee. Rob Harris reported having talked with Judge Carlson who acknowledged receiving the letter and believed the expressed concerns were essentially drafting issues. The Chair noted that the quick preparation and approval of this letter, following email input from the Committee, shows the Committee can work by email when required without waiting for a meeting. Rob also noted that, as demonstrated here, ExComm can consider proposed committee communications on extremely short time – perhaps as little as a couple of hours – where required.

## **C. Secret Liens**

The Chair noted his continuing attempts to obtain from the UCC committee their compendium on secret liens so that the Committee can determine how to proceed on this project. Mark Porter raised the issue of what might be included in the recent opinion publication from the State Bar concerning priority opinions with regard to these liens.

## **D. CCP §697.530 and judgment liens against foreign corporations**

The Chair is also continuing efforts to see if the UCC committee would be interested in a proposal to establish a method for recordation of judgments against a foreign corporation to create a blanket lien on all assets, as was possible in California under prior Article 9. He expects to have a report by the next meeting.

## **E. CUFTA Technical Amendments**

Dan Schechter provided a proposal to correct numbering errors which arose when last year's ALP to restore Badges of Fraud to the California Uniform Transfer Act was enacted. Dan will recirculate the proposal to the Committee.

## **F. New ALP re Attachment Liens.**

The Committee next discussed at length Dan Schechter's ALP regarding attachment liens and the treatment in bankruptcy of claims based on attachment liens, in light of *Southern California Plastics, Inc.*, 165 F.3d 12443 (9<sup>th</sup> Cir. 1999). In that case, the court held that allowance of a claim in bankruptcy did not satisfy a necessary judgment requirement for perfection of the California attachment lien; a California judgment was required. The Committee discussed several approaches to remove the burden on litigant imposed by this case, including Dan's proposed statutory addition to clarify that an allowed claim in bankruptcy satisfies the judgment requirement. The Committee also discussed (i) using law review articles and litigation to get the Circuit to change the ruling, (ii) a possible statute equating an attachment lien with a judgment lien and concerns about whether adequate process for allowance of the claim would arise with such a parity, (iii) possible problems with bankruptcy specific state laws, and (iv) the possibility of amending the Bankruptcy Code (specifically Section 546 or Section 502) to address the issue. Molly Baier will provide Dan

language for a comment to the proposed statute which would say that California legislature found the holding in the above case incorrect and enacted the statute to provide relief. The ALP will be recirculated and voted on at the next meeting, and the Committee will consider if any other committees of the Section might be interested in, or opposed to, the ALP.

**G. Lis Pendis Project**

With regard to his proposal related to obtaining a lis pendens in fraudulent transfer cases based on the *Kirkeby v. Superior Court* case, Dan received negative comments from Richard Esterkin at Morgan Lewis and wants to follow up with him to explore his concerns. He will send Richard's comments around when obtained.

**9. Legislation.**

Mike Koch then reported on the following projects and bills.

**A. State Bills.**

AB 3103 is still in front of the Assembly Judiciary Committee.

Nothing new is known about the efforts to repeal the Bulk Sales Law or plans this year to move it forward. Mike will inquire.

**B. Federal Bills.**

**S832:** Amending the preference and fraudulent conveyance provision concerning officer compensation, was referred to the Senate Judiciary Committee over one year ago and no further action has been taken.

**HR 2120:** Netting provisions included in B.A.R.F., is on the House Calendar for 2004.

**S1264:** Reauthorizing FCC and effectively overruling *Nextwave*, is on the Senate Calendar but no action has been taken in over 12 months.

**S1331:** Cancellation of indebtedness measure in response to WorldCom bankruptcy, was referred to the Senate Finance Committee in June 2003 without further action.

**S1920:** Amending Chapter 12, passed the House and the Senate and is in conference.

**S1970:** Bankruptcy Fairness Act, also aimed at recovering excessive officer compensation by amending fraudulent transfer and preference statutes, referred to the Senate Judiciary Committee over one year ago and no further action taken.

**HR 4571** Amending Rule 11, passed the House and was referred to a Committee of the Senate.

**(HR 4247 and S2278):** To split the Ninth Circuit into three separate Circuits, (have been referred to Committees in their respective chambers) and the Committee will keep tracking the bill.

### **C. CLRC.**

With regard to the CLRC memo discussing proposed revisions to the mechanics lien law, Mike Koch reports it is on calendar to be heard at the Commission's November meeting, along with the proposal regarding subjective intent and waiver of the attorney-client privilege. With regard to the Assignment for the Benefit of Creditors project, Mark Porter indicated he had inquired of David Gould on the survey on the uses of ABC's in California, but had nothing new to report. Mark intends to keep inquiring on a monthly basis with David to see what progress can be made and how the Committee can be helpful and to ascertain the status of a proposal which may be made to the National Conference of Commissioners on Uniform State Laws concerning ABCs.

### **10. Publications Subcommittee Current Projects Report.**

The California Legislative Bulletin is still published and Dan Shemano is going to contact Louis Dienes on ExComm to investigate. The Business Law Section News is due in June 2005 and the Committee submitted 2-3 articles last year for it. Mark Porter suggested we could possibly publish something regarding Section 363(f) relief in the Northern District after adoption of the new guidelines, and that he was considering an article on usury related to venture capital bridge loans. Finally, the Committee discussed the annual officer report which looks back over the year's activities. Rob Harris noted it had not been done for the last two years and that it presented an opportunity to note the Committee's accomplishments.

### **11. Update from Executive Committee Liaison.**

Rob Harris indicated he had already covered the ExComm items on his list and developed a list of questions on which to inquire, and had nothing further to report.

### **12. Bankruptcy Law Advisory Commission.**

The Committee discussed the legal specialization name change and the appearance in Monterey of Hagop Bedoyan and Wes Avery from the Bankruptcy Law Advisory Commission to address the Committee and report that the name change was approved by the State Board of Legal Specialization. Peter Bronson had undertaken to contact the Commission to explore a way to open the communication. He reported that he had attempted to contact Scott Bovitz, discovered he was not the head of the Bankruptcy Advisory Commission, and that Scott Avery was now in that position. Mike Koch was to send brochures he had received on the specialization and to inquire about input on the exam. The Committee inquired about the make-up of the Commission and that it was made up of several people including a staff lawyer, Radmilla Fulton, a law professor, a public member, David Gould and Mike Cooper. With regard to the larger problem of having this agency act independently from committees representing the constituencies affected by its certification projects, Rob Harris indicated that Marie Hogan was now the ExComm liaison for umbrella organizations, and Sharon Dutton volunteered to speak with her about the Committee's concerns.



**13. New Business.**

There were no additional items of new business.

**14. Adjournment.**

The meeting was adjourned at approximately 12:30 p.m.

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Mark Porter, Secretary